

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GAIL M. WRIGHT)	
Claimant)	
)	
VS.)	
)	
MYERS PAINTING COMPANY, INC.)	
Respondent)	Docket No. 1,022,754
)	
AND)	
)	
KANSAS BUILDING INDUSTRY WORKERS' COMPENSATION FUND)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier request review of the June 7, 2005, preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) found claimant's injury arose out of and in the course of her employment with respondent on April 6, 2005. Joe D. Davison, M.D., was authorized as claimant's treating physician, and respondent was ordered to pay medical and temporary total disability compensation until claimant is released from treatment.

The respondent and its insurance carrier claim the ALJ erred in finding that claimant suffered an accidental injury that arose out of and in the course of her employment with respondent. Respondent argues that the burden of proof is on the claimant to establish her right to an award of compensation and that claimant failed to meet that burden. According to respondent, the testimony of claimant is not consistent with the testimony of two of her co-workers and claimant is not credible.

Claimant argues that the credibility of witnesses should not be left up to a reviewing court but should be left to the judge who was able to see the witnesses. Claimant requests that the order of the ALJ be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record compiled to date, the Board makes the following findings of fact and conclusions of law:

Claimant testified that on April 6, 2005, she was working as a foreman on a painting crew for respondent. In addition to being a supervisor, she performed painting responsibilities as well. On April 6, 2005, claimant was working at a residential property. She was climbing a 10-foot ladder to paint the top molding of the dining room/kitchen and had gotten to the seventh step of the ladder when she slipped off and fell. Claimant stated that as she fell, she caught herself with her feet and then went backward, her body twisted and hit the ladder, and she landed on her back side.

Claimant testified she was the only one in the room when she fell and that she sat on the floor for five minutes before standing back up. No one came into the room during this five-minute period. After claimant stood back up and began to clean up the mess of the spilled paint, Kevin Staats came into the room and asked her if she was okay. Claimant claims she told him she had slipped off the ladder but was fine. She then cleaned up the paint spill, climbed back on the ladder and continued to work for the rest of the day, about an hour to an hour and a half.

Claimant testified that when she got off work, she stopped at a bar for about an hour to visit with a friend and then went home. Later that evening, about 10:00 to 10:30 p.m., she left home and went to another bar, where she sat and listened to karaoke. Claimant testified she had no problem sleeping that night, but when she awoke the next morning, she had pain in her lower back and had trouble getting out of bed. She called respondent's owner, Fred Myers, and told him about her fall. She asked him whether she should call a doctor, and he told her to do what she thought was right. She claims she hung up the phone, and about five minutes later, Mr. Myers called her back and told her to go to the doctor and send the bills to him.

Claimant went to see Dr. Joe Davison at West Wichita Minor Emergency Office. Claimant complained of tenderness with swelling in the lumbar area and back spasms. The office notes for that April 7, 2005, examination contain a history that is consistent with claimant's testimony concerning her accident: "She was working at Meyer Printing [*sic*] when she lost balance on a ladder yesterday. She woke up this morning and she has a very tender lumbar area."¹ Upon examination, Dr. Davison noted swelling in the L5-S1 area but no discoloration or hematoma. He treated her with pain medication and muscle relaxants. Claimant followed up with Dr. Davison four days later, at which time he diagnosed her as having a fractured or contused coccyx with soft tissue damage. An x-ray was negative, with no evidence of a fracture. On April 18, 2005, claimant was seen by Dr.

¹P.H. Trans., Cl. Ex. 2 at 7.

Stan A. Messner, and he recommended an MRI of her back. It appears that test is awaiting approval from the workers compensation insurance carrier. Dr. Davison's note of May 2, 2005, indicates claimant's coccyx contusion/fracture is slowly getting better. He continued her pain medication.

Mr. Staats testified that he is claimant's supervisor. He stated he was in the same room with claimant when a bucket of paint fell off her ladder. He testified that within a second or two of hearing the bucket fall, he turned around to look at claimant and saw her pick up her bucket of paint, clean up her mess, and go back to work. He did not see claimant fall off a ladder. Mr. Staats continued to work with claimant the rest of the day, and she did not mention falling off a ladder. He did not notice that she had any trouble climbing the ladder and painting the rest of the day.

Alex Rios testified that he is a painter employed by respondent. He was part of the crew painting with claimant on April 6, 2005. Mr. Rios testified that he was in the living room painting, and claimant and Mr. Staats were in the kitchen. Mr. Rios did not see claimant fall. After he got off work, he went to a bar and saw claimant there sitting and drinking. After that, he went home, changed clothes and went to another bar. He saw claimant again at the second bar, and she was again just sitting and was drinking soda. He visited with claimant at the second bar, and she told him she had fallen off a ladder at work and had a little pain.

It is difficult to reconcile the testimony of claimant and Mr. Staats, unless claimant spilled a bucket of paint more than once on April 6, 2005. The inconsistencies between claimant's testimony and the testimony of Mr. Rios, however, are less significant. In fact, that claimant told Mr. Rios about her accident after work on the same night that it happened supports claimant's claim of a work-related accident. What Mr. Rios does not support is that claimant was working alone for an extended period of time during the afternoon of April 6, 2005.

Generally, the Board will give some deference to the ALJ's determination of credibility where, as in this case, the ALJ had the opportunity to observe the witnesses testify in person. After reviewing the testimony and exhibits, the Board is persuaded that the ALJ's findings and conclusions should be affirmed. Although the inconsistencies between claimant's and Mr. Staats' versions of events is troubling, at this point in the proceedings and based upon the record presented, the Board finds that by the barest of margins, claimant has met her burden of proving she suffered personal injury by accident on April 6, 2005, as alleged, and that her current need for treatment is attributed to that work-related injury.

As provided by the Act, preliminary hearing findings are not binding but are subject to modification upon a full hearing on the claim.²

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated June 7, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2005.

BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
Roy T. Artman, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

²K.S.A. 44-534a(a)(2).